

Aisyah bt Mohd Rose & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
P-09-172-06 OF 2014
MOHTARUDIN BAKI, TENGKU MAIMUN AND ZAKARIA SAM JJCA
13 NOVEMBER 2015

Criminal Law — Criminal breach of trust — Element of entrustment — Whether proven — Whether indirect entrustment was sufficient — Whether first appellant dominion over cheques issued — Dishonest misappropriation — Whether first appellant misappropriated cheques — Whether first appellant caused wrongful gain to second appellant

Criminal Procedure — Charge — Defective charge — Whether first charge against appellants was defective for lumping 27 transactions of different amounts and different dates into one charge — Whether there should be separate charge for every offence — Whether prosecution breached s 164 of the Criminal Procedure Code — Whether first charge properly framed and valid — Combining two particulars of offence in charge — Whether appellants misled or prejudiced by error in particulars of charge — Failure to state particulars of abetment — Whether charge defective for lack of particulars — Conviction — Validity of conviction — Sentence — Appeal against — Principles governing — Whether trial judge considered mitigating factors before passing sentence — Whether appellate interference necessary

The first appellant, the wife of the second appellant, was the Head of Customer Service of Bank Muamalat Bhd, Penang ('the bank'), while her husband ('the second appellant') was a partner in a legal firm. The second appellant had ceased to practice law in 2003, and was in charge of the administration of the legal firm. During the period from 23 February 2009 until 7 December 2009 four companies had instructed their respective banks to issue general crossing banker's cheques to be made payable to the State Director of Customs, Penang, for the purpose of payment of customs duties. However, these cheques were collected from the respective banks by intermediaries, who had not passed them over to the Customs Unit for payment of customs duties but had instead handed the said cheques to the second appellant, who had then passed the said cheques to the first appellant. As the customs did not have an account with the bank, the said cheques ought to have been returned to the bearers of the cheques. Instead of returning the cheques, the first appellant had filled up bank deposit slips, instructed the bank tellers to process the cheques and approved the process for the cheques' clearance. The first appellant eventually credited

- A the said cheques into the second appellant's client account and the second appellant withdrew the money from the client's account. An internal audit of the bank revealed an act of misappropriation in respect of the cheques, which led to a report being lodged and both appellants being charged for criminal breach of trust ('CBT') under s 409 of the Penal Code ('the Code') ('first charge') and a second offence of engaging in or attempting to engage in money laundering activities contrary to s 4(1) of the Anti-Money Laundering and Anti-Terrorist Financing Act 2001 ('the AMLATFA') ('second charge'). Both the appellants denied the charges against them. It was the first appellant's defence that she had not acted contrary to the law or the bank's rules and regulations but merely followed the wishes of the client, ie the second appellant, to credit the said cheques into the account of a third party. The second appellant's defence was similarly premised on client's instructions. The sessions court judge found that the prosecution had proved its case against the appellants beyond reasonable doubt and sentenced each appellant to ten years' imprisonment for the first charge and to five years' imprisonment for the second charge, with the sentences to run concurrently. The appellants appeal to the High Court was dismissed and hence the present appeal on the grounds that the first charge against them was defective and illegal. It was the appellants' argument that the first charge involved 27 transactions of different amounts and different dates and that by lumping all 27 transactions in one charge and one trial, the prosecution had breached ss 163 and 164 of the Criminal Procedure Code ('the CPC'). The appellants further submitted that the prosecution had failed to prove the element of entrustment, which it was required to do under s 409 of the Code, and that since no parties had suffered any loss the element of 'dishonestly' in s 24 of the Code had not been proved.

Held, dismissing the appeal against convictions but allowing the appeal against sentence:

- G (1) In the present case, the first charge against the appellants was in respect of 27 transactions. Under s 164 of the CPC, an accused may be charged with and tried at one trial for a maximum of three offences of the same kind committed within the space of 12 months from the first to the last of such offences. However, s 164 speaks of offences in general whereas there is a specific provision in relation to the offence of CBT found in s 153(2) of the CPC. Section 153(2) of the CPC clearly stipulates that for an offence of CBT, it should be sufficient to specify the gross sum and the dates between which the offence was alleged to have been committed without specifying particular items or exact dates. In the present case, the first charge was in respect of the gross amount of RM1,578,191 accumulated from 27 separate transactions that were transacted within the period from 23 February 2009 until 7 December 2009. As such, the first charge against the appellants was properly framed and was valid (see paras 23–26).

- (2) Although s 163 of the CPC stipulates that for every offence, there should be a separate charge, there was no violation of this section in the instant appeal because there were no distinct offences but only the offence of CBT. If at all there was an error, it was for combining the two particulars of the offence in the charge, when the particulars ought to have been either 'entrusted with the property' or having 'dominion over the property'. However, based on s 156 of the CPC, what is of significance was not the error per se in the charge but whether the error had resulted in the appellants being misled. In the present appeal, the appellants had not been misled or prejudiced by the error in the particulars of the charge such that they were not able to put up a proper defence (see paras 27–30). A B C
- (3) As for the second appellant, although the charge did not state the manner of abetment, the proposition that the prosecution was at liberty to prefer a charge of abetment generally is supported by weighty authorities. In dismissing the appellants' appeal, the High Court judge had found that the second appellant had conspired with the first appellant to commit the offence of CBT and there was no reason to disagree with this finding (see paras 33–34). D
- (4) Although the first appellant was not entrusted directly with the cheques by the companies that issued those cheques, the cheques ended up with the second appellant and from him to the first appellant. The element of entrustment was wide enough to encompass not only the property being directly entrusted by the owner to the accused but also indirectly, as in the instant appeal. The first appellant being the Head of Customer Service of the bank received the cheques on trust for her to deal with the cheques in accordance with the law and with the rules and regulations of the bank. Notwithstanding that it may be a job entrustment and the first appellant had received the cheques indirectly from the companies, the fact remains that the cheques had been entrusted to the first appellant for her to deal with the cheques in accordance with its purpose, namely for payment to the customs. Further, the first appellant had dominion over the cheques, which had allowed her to credit the said cheques into the third party's account (see paras 37, 40 & 43). E F G H
- (5) As for the absence of dishonesty, by the first appellant crediting the cheques into the second appellant's client account, the first appellant had misappropriated the cheques. The first appellant could not be said to have acted in good faith when she had caused wrongful gain to the second appellant. There was also clear evidence that the second appellant would take 10–15% of the value of the cheques before giving the balance to the intermediaries. Thus, this was not a case of carelessness or negligence but a clear case of dishonest misappropriation and conversion of the cheques (see para 49). I

- A (6) In relation to the second charge, pursuant to s 4(2) of the AMLATFA, the conviction for an offence under s 4(1) could be sustained even without the conviction for a predicate offence. In this appeal, the predicate offence of CBT under s 409 of the Penal Code had been proved. As such, on the totality of the evidence, the appellants' convictions for the first and second charges were safe (see paras 51–52).
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- C (7) It is trite that an appellate court would not interfere with the sentence imposed by the trial judge unless the trial judge had wrongly applied the principles of sentencing. In the instant appeal, the subject matter of the first charge involved a huge amount of over RM1.5m. Nevertheless, it was a principle of sentencing that the mitigating factors should not be disregarded by the trial court and that both the interests of the appellants and the public should be considered. However, it was apparent from the grounds of judgment that the trial judge had not considered the mitigating factors before passing the sentence. The reasons as to why the appellants deserved the maximum sentence for the second charge was also conspicuously absent from the grounds of judgment. As such, the sentence imposed by the trial judge should be set aside and substituted with a sentence of five years and three years for the first charge and the second charge respectively, with the sentences to run concurrently (see paras 56–59).
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[Bahasa Malaysia summary]

- F Perayu pertama, isteri kepada perayu kedua, ialah Ketua Khidmat Pelanggan Bank Muamalat Bhd, Pulau Pinang ('bank tersebut'), manakala suaminya ('perayu kedua') ialah rakan kongsi dalam sebuah firma guaman. Perayu kedua telah berhenti mengamal undang-undang pada 2003, dan bertanggungjawab untuk pentadbiran firma guaman itu. Sepanjang tempoh dari 23 Februari 2009 hingga 7 Disember 2009 empat syarikat telah mengarahkan bank-bank mereka masing-masing mengeluarkan cek bank berpaling biasa yang boleh dibayar kepada Pengarah Negeri Kastam, Pulau Pinang, bagi tujuan bayaran duti kastam. Walau bagaimanapun, cek-cek tersebut telah dikutip daripada bank-bank tersebut oleh intermediari yang tidak menyerahkan cek-cek tersebut kepada Unit Kastam untuk bayaran duti kastam tetapi sebaliknya menyerahkan cek-cek tersebut kepada perayu kedua, yang kemudian menyerahkan cek-cek tersebut kepada perayu pertama. Oleh kerana pihak kastam tidak mempunyai akaun dengan bank tersebut, cek-cek tersebut sepatutnya dikembalikan kepada pemegang cek-cek tersebut. Daripada mengembalikan cek-cek tersebut, perayu pertama telah mengisi slip-slip deposit bank, mengarahkan juruwang bank memproses cek-cek tersebut dan meluluskan proses menunaikan cek-cek tersebut. Perayu pertama kemudian telah mengkreditkan cek-cek tersebut ke dalam akaun pelanggan perayu kedua dan perayu kedua telah mengeluarkan wang daripada akaun pelanggan itu. Satu audit dalaman bank tersebut mendedahkan perbuatan penyelewengan
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berkaitan cek-cek tersebut, yang membawa kepada satu laporan yang dibuat dan kedua-dua perayu telah didakwa kerana jenayah pecah amanah ('JPA') di bawah s 409 Kanun Keseksaan ('Kanun') ('pertuduhan pertama') dan kesalahan kedua terlibat atau cuba untuk terlibat dalam kegiatan pengubahan wang haram yang bertentangan dengan s 4(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Pengganas 2001 ('APPWHPPP') ('pertuduhan kedua'). Kedua-dua perayu telah menafikan pertuduhan-pertuduhan tersebut terhadap mereka. Ia adalah pembelaan perayu pertama bahawa dia tidak bertindak bertentangan dengan undang-undang atau peraturan dan kaedah bank tetapi hanya mengikut hasrat pelanggan iaitu perayu kedua, untuk mengkreditkan cek-cek tersebut ke dalam akaun pihak ketiga. Pembelaan perayu kedua adalah sama berasaskan arahan pelanggan. Hakim mahkamah sesyen mendapati pendakwaan telah membuktikan kesnya terhadap perayu-perayu melampaui keraguan munasabah dan menghukum setiap perayu dengan penjara selama sepuluh tahun untuk pertuduhan pertama dan penjara selama lima tahun untuk pertuduhan kedua, yang mana hukuman-hukuman tersebut dijalankan serentak. Rayuan perayu-perayu kepada Mahkamah Tinggi telah ditolak dan justeru rayuan ini atas alasan bahawa pertuduhan pertama terhadap mereka adalah defektif dan menyalahi undang-undang. Ia adalah hujah perayu-perayu bahawa pertuduhan pertama melibatkan 27 transaksi dalam jumlah berbeza dan tarikh berbeza dan bahawa dengan menggabungkan kesemua 27 transaksi dalam satu pertuduhan dan satu perbicaraan, pendakwaan telah melanggar ss 163 dan 164 Kanun Tatacara Jenayah ('KTJ'). Perayu-perayu selanjutnya berhujah bahawa pendakwaan telah gagal untuk membuktikan elemen amanah, yang mana ia dikehendaki untuk lakukan di bawah s 409 Kanun, dan oleh kerana tiada pihak yang mengalami apa-apa kerugian elemen 'dishonestly' dalam s 24 Kanun tidak dibuktikan.

Diputuskan, menolak rayuan terhadap sabitan-sabitan tetapi membenarkan rayuan terhadap hukuman:

- (1) Dalam kes ini, pertuduhan pertama terhadap perayu-perayu adalah berkaitan 27 transaksi. Di bawah s 164 KTJ, seorang tertuduh boleh dituduh dengan dan dibicarakan dalam satu perbicaraan untuk maksimum tiga kesalahan. Walau bagaimanapun, s 164 menyatakan tentang kesalahan-kesalahan secara umum manakala terdapat peruntukan spesifik berkaitan kesalahan JPA yang didapati dalam s 153(2) KTJ. Seksyen 153(2) KTJ jelas menyatakan bahawa untuk kesalahan JPA, ia adalah mencukupi untuk menyatakan jumlah kasar dan tarikh-tarikh di mana kesalahan yang dikatakan telah dilakukan tanpa menyatakan butiran tertentu atau tarikh-tarikh yang tepat. Dalam kes ini, pertuduhan pertama adalah berkaitan jumlah kasar RM1,578,191 yang terkumpul daripada 27 transaksi yang berlaku dalam tempoh dari 23 Februari 2009 hingga 7 Disember 2009. Oleh itu,

- A pertuduhan pertama terhadap perayu-perayu telah dibuat dengan betul dan sah (lihat perenggan 23–26).
- (2) Walaupun s 163 KTJ menyatakan bahawa untuk setiap kesalahan, perlu ada pertuduhan berasingan, tiada pelanggaran seksyen ini dalam rayuan ini kerana tiada kesalahan yang berbeza tetapi hanya kesalahan JPA, padahal butiran-butiran sepatutnya ‘entrusted with property’ atau mempunyai ‘dominion over the property’. Walau bagaimanapun, berdasarkan s 156 KTJ, apa yang penting bukanlah kesilapan per se dalam pertuduhan itu tetapi sama ada kesilapan itu mengakibatkan perayu keliru. Dalam rayuan ini, perayu-perayu tidak terkeliru atau diprejudiskan oleh kesilapan dalam butiran pertuduhan sehinggakan mereka tidak dapat membuat pembelaan sewajarnya (lihat perenggan 27–30).
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- (3) Berhubung perayu kedua, meskipun pertuduhan tidak menyatakan cara persubahatan itu, cadangan bahawa pendakwaan bebas untuk memilih suatu pertuduhan bersubahat biasanya disokong oleh autoriti yang kukuh. Dalam menolak rayuan perayu-perayu, hakim Mahkamah Tinggi mendapati bahawa perayu kedua telah berkonspirasi dengan perayu pertama untuk melakukan kesalahan JPA itu dan tiada sebab untuk tidak bersetuju dengan penemuan beliau (lihat perenggan 33–34).
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- (4) Walaupun perayu pertama tidak diamanahkan secara langsung dengan cek-cek tersebut oleh syarikat-syarikat yang mengeluarkan cek-cek tersebut, cek-cek tersebut akhirnya berada dengan perayu kedua dan daripadanya kepada perayu pertama. Elemen amanah adalah cukup luas untuk merangkumi bukan sahaja hartanah yang secara langsung diamanahkan oleh pemilik kepada tertuduh tetapi juga secara tidak langsung, sepertimana dalam rayuan ini. Perayu pertama yang merupakan Ketua Khidmat Pelanggan bank tersebut telah menerima cek-cek tersebut atas amanah untuk dia mengendalikan cek-cek tersebut menurut undang-undang dan kaedah-kaedah dan peraturan-peraturan bank tersebut. Walaupun ia mungkin tugas yang telah diberikan amanah dan perayu pertama telah menerima cek-cek tersebut secara tidak langsung daripada syarikat-syarikat tersebut, fakta kekal bahawa cek-cek tersebut telah diamanahkan kepada perayu pertama untuk dia mengendalikan cek-cek tersebut menurut tujuannya, iaitu untuk pembayaran kepada kastam. Selanjutnya, perayu pertama adalah dominan ke atas cek-cek tersebut, yang telah membenarkannya mengkreditkan cek-cek tersebut ke dalam akaun pihak ketiga (lihat perenggan 37, 40 & 43).
- (5) Berhubung tiada ketidakjujuran, oleh perayu pertama mengkreditkan cek-cek tersebut ke dalam akaun pelanggan perayu kedua, perayu pertama telah menyalahguna cek-cek tersebut. Perayu pertama tidak boleh dikatakan telah bertindak dengan niat baik apabila dia

menyebabkan keuntungan secara salah kepada perayu kedua. Tiada juga keterangan yang jelas bahawa perayu kedua akan mengambil 10–15% nilai cek-cek tersebut sebelum memberikan baki kepada intermediari. Oleh itu, ini bukan kes tidak berhati-hati atau kecuaiian tetapi jelas satu kes ketidakjujuran penyalahgunaan dan pengubahan cek-cek tersebut (lihat perenggan 49).

- (6) Berkenaan pertuduhan kedua, menurut s 4(2) APPWHPPP, sabitan untuk kesalahan di bawah s 4(1) boleh dikekalkan meskipun tanpa sabitan untuk kesalahan predikat. Dalam rayuan ini, kesalahan predikat KTJ di bawah s 409 Kanun telah dibuktikan. Oleh itu, berdasarkan keseluruhan keterangan, sabitan-sabitan perayu-perayu untuk pertuduhan pertama dan kedua adalah selamat (lihat perenggan 51–52).
- (7) Ia adalah tetap bahawa mahkamah rayuan tidak akan campur tangan dengan hukuman yang dikenakan oleh hakim perbicaraan kecuali hakim perbicaraan terkhilaf menggunakan prinsip-prinsip hukuman. Dalam rayuan ini, hal perkara pertuduhan pertama melibatkan jumlah yang besar lebih RM1.5j. Namun begitu, ia adalah prinsip hukuman bahawa faktor-faktor mitigasi tidak patut diabaikan oleh mahkamah perbicaraan dan bahawa kepentingan kedua-dua perayu dan orang awam hendaklah dipertimbangkan. Walau bagaimanapun, ia adalah jelas berdasarkan alasan-alasan penghakiman bahawa hakim perbicaraan tidak mengambil kira faktor-faktor mitigasi sebelum memutuskan hukuman. Sebab kenapa perayu-perayu patut menerima hukuman maksimum untuk pertuduhan kedua juga jelas tiada dalam alasan-alasan penghakiman. Oleh itu, hukuman yang dikenakan oleh hakim perbicaraan patut diketepikan dan digantikan dengan hukuman lima tahun dan tiga tahun untuk pertuduhan pertama dan pertuduhan kedua masing-masingnya, dan hukuman-hukuman tersebut hendaklah berjalan serentak (lihat perenggan 56–59).]

Notes

For cases on criminal breach of trust in general, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 238–240.

For cases on defective charge, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 1409–1452

Cases referred to

Abinash Chandra Sarkar & Ors v Emperor [1936] 37 Cr LJ 439 (refd)

Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v PP [2014] 1 MLJ 624; [2014] 1 CLJ 697, CA (refd)

Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)

Che Hasan bin Senawi v PP [2009] 1 MLJ 55, CA (refd)

Chin Chan Leong v PP & Anor and another appeal [2010] 5 MLJ 312, CA (folld)

- A** *Datuk Haji Harun bin Haji Idris & Ors v PP* [1978] 1 MLJ 240, FC (refd)
Loh Liang Gun & Anor v PP [2007] 5 MLJ 159, CA (refd)
Mohd Khir bin Toyo v PP [2015] 5 MLJ 429; [2015] 8 CLJ 769, FC (refd)
PP v Lawrence Tan Hui Seng [1993] 4 CLJ 221, SC (refd)
Pasupathy all Kanagasaby v PP [2005] 1 MLJ 493, CA (refd)
- B** *PP v Loo Choon Fatt* [1976] 2 MLJ 256 (refd)
Sanjeev Kumar all Veerasingam v PP and other appeals [2015] 2 MLJ 589;
 [2015] 4 CLJ 743, CA (refd)
Sathiadas v PP [1970] 2 MLJ 241 (refd)
- C** *Sim Gek Yong v PP* [1995] 1 SLR 537; [1995] SGHC 27, HC (refd)
Sinnathamby v PP [1948–1949] supp MLJ 75 (refd)
Som Narth Puri v The State of Rajasthan 1972 AIR 1490, SC (folld)
The State of Gujarat v Jaswantlal Nathalal [1968] 2 SCR 408, SC (refd)

Legislation referred to

- D** Anti-Money Laundering and Anti-Terrorist Financing Act 2001 ss 3(1), 4(1),
 (2)
 Bills of Exchange Act 1949 s 81A
 Criminal Procedure Code ss 153(2), 156, 163, 164, 164(1), 165, 166,
 170, 422
- E** Penal Code ss 24, 107, 405, 409

Appeal from: Criminal Appeal No 42–64–10 of 2012 (High Court, Pulau Pinang)

- F** *MM Athimulan (Md Yusuf bin Md Idris and Muhamad Asri bin Abdul Hamid with him) (Yusuf Idris & Co) for the appellants.*
Allan Suman Pillai (Anslem Charles Fernandis and Musli bin Ab Hamid with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

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Tengku Maimun JCA:

[1] The second and the first appellants are husband and wife. They both faced two charges in the Sessions Court, Penang.

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[2] The charges against the first appellant read:

- (i) Bahawa kamu di antara 23 Februari 2009 dan 7 Disember 2009 di Bank Muamalat Bhd, Bangunan D12, Universiti Sains Malaysia, Jalan Minden dalam Daerah Timur Laut di Negeri Pulau Pinang, sebagai seorang agen Bank Muamalat Berhad, iaitu sebagai Ketua Pusat Khidmat Pelanggan Bank Muamalat USM telah diamanahkan dengan penguasaan ke atas harta tertentu, iaitu RM1,578,191.00 dalam perjalanan urusan kamu sebagai Ketua Pusat Khidmat Pelanggan Bank Muamalat USM dan kamu telah melakukan satu pecah amanah jenayah berkenaan dengan harta
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tersebut dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan.

- (ii) Bahawa kamu pada 7 Disember 2009 di Bank Muamalat Malaysia Bhd, Bangunan D12, Kampung Minden 11800 Minden dalam Daerah Timur Laut di dalam Negeri Pulau Pinang, telah melibatkan diri dalam pengubahan wang haram iaitu mengubah wang berjumlah RM183,702.63 melalui sekeping cek Citibank bernombor 792248 yang bertarikh 1 Disember 2009 yang merupakan hasil dari aktiviti haram di dalam akaun pelanggan Johari, Nasri & Tan dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 4(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

[3] As against the second appellant, the charges were:

- (i) Bahawa kamu di antara 23 Februari 2009 dan 7 Disember 2009 di Bank Muamalat, Bhd, Bangunan D12, Universiti Sains Malaysia, Jalan Minden dalam Daerah Timur Laut di Negeri Pulau Pinang, telah bersubahat dengan Aishah bt Mohamed Rose (No KP 610422-07-5650) untuk melakukan pecah amanah jenayah berkenaan sesuatu harta tertentu, iaitu RM1,578,191.00 di mana Aishah bt Mohamed Rose telah diamanahkan dengan penguasaan ke atas harta tersebut dalam perjalanan urusannya sebagai Ketua Pusat Khidmat Pelanggan Bank Muamalat USM, di mana kesalahan pecah amanah tersebut telah dilakukan atas sebab persubahatan kamu dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan dibaca bersama seksyen 109 Kanun Keseksaan yang sama.
- (ii) Bahawa kamu pada 7 Disember 2009 di Bank Muamalat Malaysia Bhd, Bangunan D12, Kampung Minden 11800 Minden dalam daerah Timur Laut di dalam Negeri Pulau Pinang, telah melibatkan diri dalam pengubahan wang haram iaitu memiliki wang berjumlah RM183,702.63 yang merupakan hasil dari aktiviti haram di dalam akaun pelanggan Johari, Nasri & Tan dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 4(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

THE BACKGROUND FACTS

[4] Briefly, the first appellant was, at the material time the Head of Customer Service of Bank Muamalat Bhd, USM, Penang ('the Bank'). The second appellant was formerly an advocate and solicitor and was a partner in a legal firm, Messrs Johari, Nasri & Tan ('the firm'). Though he had ceased to practise in 2003, the second appellant was at the material time, still in charge of the administration of the firm including giving directions to lawyers and staffs.

A [5] Four (4) companies namely Sanmina SCI Sdn Bhd, DSV Air & Sea Sdn Bhd, GAC Cargo System Sdn Bhd and Apex Pal Sdn Bhd ('the companies') had instructed their respective banks to issue banker's cheques ('the cheques'). The cheques were general crossing cheques. The payee of the cheques was the State Director of Customs, Penang ('the Customs') and the purpose of the cheques was for payment of customs duties.

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C [6] The cheques were collected from the respective banks by the intermediaries who had been authorised by the companies to make payment to the customs. The intermediaries did not take the said cheques directly to the counter of the Customs Revenue Collection Unit for payment of customs duties but had handed the cheques to the second appellant who then passed the cheques to the first appellant.

D [7] The customs had no account with the bank and the rules and regulations of the bank do not allow crossed cheques to be processed and credited into a third party account. In the circumstances, the cheques should be returned to the bearers.

E [8] Instead of returning the cheques and contrary to rules and regulations of the bank, the first appellant filled up the bank deposit slips, 'over ride' the cheques, instructed the tellers (SP5-SP9) to process the cheques and approved the process for the cheques' clearance. The first appellant eventually credited the cheques into the second appellant's client account, the third party. The second appellant thereafter withdrew the money from the client's account.

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G [9] An internal audit of the bank revealed an act of misappropriation in respect of the cheques which led to a police report being lodged and subsequently, to the charges being preferred against the appellants.

H [10] We do not propose to set out the proceedings in and the findings of the sessions court, except to state that the appellants denied the charges against them. The first appellant stated in her defence that it was a common practice for crossed cheques to be credited into the account of a third party and that she was merely following the wishes of the client/customer, namely the second appellant, her husband. She maintained that what she did was not contrary to the law or the bank's rules and regulations. As for the second appellant, the defence was similarly premised on client's instructions. It must however be noted that neither the customs nor the four companies were the client of the firm.

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[11] The sessions court judge found that the prosecution had proved its case against the appellants beyond reasonable doubt. They were each sentenced to ten years imprisonment for the first charge and to five years imprisonment for

the second charge. The sentences were to run concurrently. Their appeal to the High Court against the convictions and sentences were dismissed, hence the appeal to this court.

A

THE APPEAL

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[12] Before us, learned counsel for the appellants raised the following issues:

- (a) that the first charge was defective, illegal and in breach of s 163 of the Criminal Procedure Code ('the CPC') and that the charge of abetment against the second appellant was also defective for failure to particularise the manner of abetment;
- (b) that there was no evidence of entrustment; and
- (c) that there was no loss suffered by any parties.

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DEFECTIVE/ILLEGAL CHARGE

[13] The gross amount of RM1,578,191 stated in the first charge against the appellants was accumulated from 27 transactions. Learned counsel submitted that there should be 27 different charges as each of the transaction was a complete offence in itself.

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[14] In contending that the first charge was defective and illegal which could not be cured under s 422 of the CPC and that on this ground alone the appeal ought to be allowed, learned counsel relied on ss 163 and 164(1) of the CPC which provide:

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163 For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 164, 165, 166 and 170.

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164 (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offence, whether in respect of the same person or not, he may be charged with and tried at one trial for any number of them not exceeding three.

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[15] Learned counsel also submitted that the first charge which reads 'diamanahkan dengan penguasaan ke atas harta tertentu' was unknown to law as the wording did not reflect the provision of s 409 which reads:

409 Whoever, being in any manner entrusted with property, or with any dominion over the property, in his capacity of a public servant or an agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than two years and not more than twenty years and with whipping and shall also liable to fine.

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- A [16] In this regard, the complaint of learned counsel was that under s 409, there are two limbs namely, 'entrusted with property' or 'dominion over the property' whereas the charge against the appellants had merged the elements of 'entrusted' with 'dominion over the property'.
- B [17] In respect of the charge of abetment against the second appellant, the word stated in the charge was 'telah bersubahat' with the first appellant to commit the criminal breach of trust. Relying on the case of *Sanjeev Kumar a/l Veerasingam v Public Prosecutor and other appeals* [2015] 2 MLJ 589; [2015] 4 CLJ 743 learned counsel contended that the charge was defective as it did not particularise the manner the act of abetment was done, namely whether by way of instigating, conspiring or aiding the doing of the act as provided under s 107 of the Penal Code.
- C
- D ELEMENT OF ENTRUSTMENT
- E [18] On the second issue, learned counsel submitted that to prove the charge under s 409 of the Penal Code, the prosecution must prove the element of entrustment and that the existence of entrustment can be in two ways:
- F (a) by the appellant being entrusted with the property; or
- (b) by the appellant having dominion over the property.
- G [19] In the present appeal, it was contended that the appellants have never been entrusted with the cheques by the owners as the cheques were passed through 14 intermediaries before they reached the second appellant and subsequently, the first appellant.
- H [20] There being no evidence of entrustment between the first appellant and the four companies, the owners of the cheques, it was the submission of learned counsel that the trial judge was wrong when she made a finding that entrustment occurred when the first appellant received the cheques.
- I [21] Citing *The State Of Gujarat v Jaswantlal Nathalal* [1968] 2 SCR 408 and *Public Prosecutor v Lawrence Tan Hui Seng* [1993] 4 CLJ 221, learned counsel submitted that entrustment can only be created by the owners of the cheques themselves and not through the intermediaries. And that in order to establish the existence of actual entrustment, the prosecution must prove that there was a fiduciary relationship between the first appellant and the owners of the cheques, which was never proved throughout the case. It was further the submission of learned counsel that even if crediting the cheques into the third party's account was not allowed, it was an entrustment of a job rather than entrustment of the property itself to the first appellant.

NO LOSS SUFFERED

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[22] On the third issue, learned counsel submitted that the cheques, though had been credited into the third party's account, were subsequently paid to the customs. In view of the payment, the companies received the goods. There was no claim filed by the bank or the customs. It was thus contended that no party had suffered wrongful loss to bring the case within the purview of 'doing an act dishonestly'.

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OUR FINDINGS

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Defective/Illegal charge

[23] The offences for which the appellants were charged involved 27 transactions of different amounts and different dates. Under s 164, an accused may be charged with and tried at one trial for a maximum of three offences of the same kind committed within the space of twelve months from the first to the last of such offences. To lump all 27 transactions in one charge and one trial, it was contended by learned counsel that the prosecution had breached s 164 of the CPC.

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[24] With respect, we disagree with learned counsel. Although the first charge against the appellants was in respect of 27 transactions and that each and every transaction was made at a different time involving different amounts, they were transacted within the period of one year, namely from 23 February 2009 until 7 December 2009.

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[25] We note that while s 164 speaks of offences in general, there is a specific provision in relation to the offence of criminal breach of trust. This is found in s 153(2) which states as follows:

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When the accused is charged with criminal breach of trust or dishonest misappropriation of money it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed, without specifying particular items of exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 164:

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Provided that the time included between the first and last of such dates shall not exceed one year.

[26] The specific provision of s 153(2) in our view would prevail over the general provision in s 164. In the light of s 153(2) above which clearly stipulates that for an offence of a criminal breach of trust, it shall be sufficient to specify the gross sum and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, we find that the

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A first issue is devoid of any merit. We therefore hold that the first charge against the appellants was properly framed and was valid.

B [27] In respect of the contention that the charge of ‘diamanahkan dengan penguasaan terhadap harta tertentu’ was unknown in law, learned counsel highlighted that there was no provision for such offence of ‘entrusted with the dominion over the property’ as s 409 provides for ‘... entrusted with property or with any dominion over the property’. Learned counsel submitted that the charge was confusing and had caused prejudice to the appellants in defending themselves. Citing the Indian case of *Abinash Chandra Sarkar & Ors v Emperor* [1936] 37 Cr LJ 439, learned counsel contended that the defect in the charge could not be cured as it violates s 163 of the CPC.

D [28] Section 163 of the CPC as quoted above, stipulates that for every distinct offence, there shall be a separate charge. In the instant appeal, there were no distinct offences but only the offence of criminal breach of trust. In our view, there was no violation of s 163 of the CPC as such, except that if at all there was an error, it was for combining the two particulars of the offence in the charge, when the particulars ought to have been either ‘entrusted with the property’ or having ‘dominion over the property’.

E [29] We find the answer to this error in s 156 of the CPC which reads:
F No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.

G [30] Based on the above provision, what is of significance is not the error per se in the charge but whether the error had resulted in the appellants being misled. We are not convinced that the appellants had in fact been misled or prejudiced by the error in the particulars of the charge such that they were not able to put up a proper defence.

H [31] We wish to add that this court had considered similar issue in *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v Public Prosecutor* [2014] 1 MLJ 624; [2014] 1 CLJ 697 where the charge of criminal breach of trust under s 409 Penal Code was similarly worded ‘... telah diamanahkan dengan penguasaan ke atas dana syarikat tersebut ...’. Applying ss 156 and 422 of the CPC, it was held that the charge so framed was not fatal to the prosecution case.

I [32] On the charge for abetment, s 107 of the Penal Code provides as follows:

A person abets the doing of a thing who:

- (a) instigates any person to do that thing; A
- (b) engages with one or more person or persons in any conspiracy for the doing for that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and that in order to the doing of that thing; or
- (c) intentionally aids, by any act or illegal omissions, the doing of that thing. B

[33] While we agree that the charge against the second appellant did not state the manner of abetment, following the decision of this court in *Chin Chan Leong v Public Prosecutor & Anor and another appeal* [2010] 5 MLJ 312, we find that the charge was not defective. In *Chin Chan Leong*, this court had stated that the proposition that the prosecution is at liberty to prefer a charge of abetment generally is supported by weighty authorities (see *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240 FC; *Pasupathy a/l Kanagasaby v Public Prosecutor* [2005] 1 MLJ 493 and *Loh Liang Gun & Anor v Public Prosecutor* [2007] 5 MLJ 159). We note that none of these cases were cited in *Sanjeev Kumar*, relied upon by learned counsel for the appellants. C

[34] Further, we do not find anything in the records of appeal which suggest that the second appellant was confused by the lack of particulars of abetment. To the contrary, we find from the records of appeal that the defence of the second appellant that the acts were done pursuant to his client's instructions was not in any way hindered by the absence of the manner of abetment. The second appellant did not dispute the fact that he received the cheques from the intermediaries and that he had given them to the first appellant, which resulted in the cheques being deposited into his client's account and that thereafter he withdrew the money. In dismissing the appellants' appeal, the High Court judge found that the second appellant had conspired with the first appellant to commit the offence of criminal breach of trust. We see no reason to disagree with the High Court judge. D

Element of entrustment

[35] To bring home the charge of criminal breach of trust, the prosecution must prove that the first appellant was entrusted with the cheques or that the first appellant had dominion over the cheques. The gist of the offence is, that there is dishonest misappropriation or conversion to one's own use or that there is dishonest user in violation of a direction, express or implied, relating to the mode in which the trust is to be discharged (see *Sathiadas v Public Prosecutor* [1970] 2 MLJ 241). E

[36] We note that s 409 of the Penal Code states 'whoever being in any manner entrusted'. F

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- A [37] We accept that the first appellant was not entrusted directly with the cheques by the companies but it cannot be denied that through the intermediaries, the cheques ended up with the second appellant and from the second appellant, to the first appellant. In our view ‘in any manner entrusted’ is wide enough to encompass not only the property being directly entrusted by the owner to the accused but also property entrusted by the owner to the accused indirectly, as in the instant appeal, entrusted to the first appellant by virtue of her position as an agent of the bank.
- B
- C [38] We find support in the case of *Som Narth Puri v The State of Rajasthan* 1972 AIR (SC) 1490 which states:
- D Section 405 Penal Code merely provides, whoever being in any manner entrusted with property or with any dominion over the property, as the first ingredient of the criminal breach of trust. The words ‘in any manner’ in the context are significant.
- E The s. does not provide that the entrustment of property should be by someone or the amount received must be the property of the person on whose behalf it is received. As long as the accused is given possession of property for a specific purpose or to deal with it in a particular manner, the ownership being in some person other than the accused, he can be said to be entrusted with that property to be applied in accordance with the terms of entrustment and for the benefit of the owner. The expression ‘entrusted’ in section 409 is used in a wide sense and includes all cases in which a property is voluntarily handed over for a specific purpose and is dishonestly disposed of contrary to the terms on which possession had been handed over ...
- F [39] At this juncture it is pertinent to note that s 81A of the Bills of Exchange Act 1949 provides:
- G (1) Where a cheque is crossed and bears across its face the words ‘account payee’ or ‘a/c payee’, either with or without the word ‘only’, the cheque shall not be transferable, but shall only be valid as between the parties thereto.
- H [40] The first appellant being the Head of Customer Service Centre, Bank Muamalat, USM received the cheques on trust, for her to deal with the cheques in accordance with the law and with the rules and regulations of the bank. Notwithstanding that it may be a job entrustment and that she received the cheques not directly from the companies, the fact remains that the cheques had been entrusted to the first appellant, for her to deal with the cheques in accordance with its purpose, namely for payment to the customs.
- I [41] We agree with the trial judge when she stated that:
- pengamanahan berlaku apabila OKT 1 menerima cek-cek tersebut walaupun pihak pembela mempertikaikan bahawa pemilik cek tidak memberikan pengamanahan kepada OKT 1, tetapi rantai keterangan menunjukkan pemilik cek telah memberi kuasa kepada pengantara untuk menyampaikan cek kepada Pengarah Kastam untuk pembayaran duti. Tetapi cek-cek ini telah diberi kepada OKT 2 dan akhirnya

kepada OKT 1 yang telah memasukkan cek ke dalam akaun pihak ketiga. Beliau sepatutnya mengembalikan cek-cek tersebut tetapi gagal membuat demikian. Beliau telah override cek-cek dan meluluskan pembayaran cek-cek.

A

[42] Even if the submission of learned counsel is to be accepted that the element of ‘entrusted with the property’ was not proven, we find that the first appellant clearly had dominion over the cheques. In *Sinnathamby v Public Prosecutor* [1948–1949] supp MLJ 75 the principle on dominion is stated as follows at p 76:

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... applies not merely in cases where the exercise or possession of dominion over property is one of the legal incidents of the contract of service but in every case where by virtue of the existence of contract of service the accused person is in fact in a position to exercise dominion.

C

[43] In the present appeal, we are satisfied from the facts that the first appellant had dominion over the cheques. Without such dominion, the first appellant would not be able to do what she had done in terms of processing the crossed cheques which eventually led to the crediting of the cheques into the third party’s account.

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No loss suffered

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[44] On this issue, learned counsel submitted that no parties had suffered any loss and hence the element of ‘dishonestly’ in s 24 of the Penal Code had not been proved.

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[45] As apparent from s 24 of the Penal Code which is reproduced below, we find that actual wrongful loss or gain is not an ingredient to be proved for the offence of criminal breach of trust:

24 Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain, is said to do that thing ‘dishonestly’.

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[46] It is thus immaterial that no one suffered any loss as a consequence of the acts of the appellants. In this regard, Raja Azlan Shah J (as the late Royal Highness then was) had said in *Sathiadas*:

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Criminal breach of trust is not an offence which counts as one of its factors, the loss that is the consequence of the act, it is the act itself which is in law, amounts to an offence. The offence is complete when there is dishonest misappropriation or conversion to one’s own use, or when there is dishonest user in violation of a directions express or implied, relating to the mode in which the trust is to be discharged ...

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[47] Be that as it may, the trial judge had in fact made a finding on wrongful

A loss. She stated that:

saksi-saksi turut memberi keterangan bahawa barang-barang yang perlu dibayar cukai telah diseludup masuk ke dalam lori yang memuatkan barangan yang telah dibayar cukai. Ini menyebabkan kerugian kepada pihak kerajaan kerana duti-duti tidak dibayar.

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[48] Having perused the appeal records, we find that the above finding of the trial judge was correct as it was supported by the following evidence from SP24:

C S: Bagaimana barangan yang sepatutnya dibayar duti tersebut boleh dikeluarkan sedangkan di dalam kes ini duti kastam tidak dibayar. Boleh jelaskan?

D J: Kami mengambil inisiatif dengan membawa, menumpang barangan tersebut di dalam lori-lori ejen, saya bawa keluar barang itu melalui kerani saya dan kami akan mengeluarkan barang bercukai tanpa pengetahuan kastam. Kami akan keluar menumpang lori-lori yang telah dibayar duti kastam tersebut menyeludup keluar daripada kawasan kastam melalui pintu kastam.

E [49] Further, by the first appellant crediting the cheques into the second appellant's client account, we find that the first appellant had misappropriated the cheques. The first appellant cannot be said to have acted in good faith. She had without doubt, caused wrongful gain to the second appellant. There was clear evidence that the second appellant would take 10–15% of the value of the cheques before giving the balance to the intermediaries (see for example, the evidence of SP39). From the facts we find that this is not a case of negligence or carelessness but a clear case of dishonest misappropriation and conversion of the cheques.

G *AMLATFA*

H [50] Moving on to the second charges under the Anti-Money Laundering and Anti-Terrorist Financing Act 2001 (AMLATFA), s 4(1) provides that any person who engages in or attempts to engage in money laundering commits an offence. Money laundering as defined in s 3(1) of the AMLATFA is the act of a person who engages directly or indirectly, in a transaction that involves proceeds of an unlawful activity. Unlawful activity is any activity which is related, directly or indirectly to any serious offence or any foreign serious offence. Under the Second Schedule of the AMLATFA, the offence under I s 409 of the Penal Code has been listed as a serious offence.

[51] For completeness, we acknowledge that pursuant to s 4(2) of AMLATFA, the conviction for an offence under s 4(1) can be sustained even without the conviction for a predicate offence. In this appeal, the predicate

offence of criminal breach of trust under s 409 of the Penal Code has been proved.

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[52] On the totality of the evidence, we are unanimous in our view that the convictions of the first and the second appellant for the first charge are safe. It follows that the offence for the second charge under AMLATFA is also safe. We therefore dismiss the appeal against convictions and we affirm the convictions of the appellants.

B

Appeal on sentences

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[53] On sentence, the punishment for the first charge as provided under s 409 of the Penal Code is an imprisonment term of not less than two years and not more than 20 years while for the second charge under s 4(1) of the AMLATFA, the maximum sentence of imprisonment is five years.

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[54] The learned sessions judge had sentenced each of the appellant to ten years and five years imprisonment for the first charge and the second charge respectively, the sentences to run concurrently. The following were the reasons given by the sessions judge for the said sentences:

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... Mahkamah berpendapat kesalahan yang dilakukan adalah serius. Kedua-dua OKT adalah terpelajar dan profesional. Kerajaan turut rugi atas penyalahgunaan pembayaran wang duti yang hasilnya tidak diterima olehnya. Mahkamah berpendapat satu hukuman yang berat perlu dijatuhkan terhadap OKT 1 & 2.

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[55] Learned counsel submitted that the sentences, which were affirmed by the High Court, were manifestly excessive. Learned counsel highlighted the fact that throughout the investigation, the appellants had co-operated with the enforcement agencies and that public interest is best served by giving the appellants the second chance to turn over a new leaf. Learned DPP on the other hand urged that the sentences be maintained on the ground of public interest and that the amount involved was huge.

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[56] It is trite that an appellate court will not interfere with the sentence imposed by the trial judge unless the trial judge had wrongly applied the principles of sentencing or had embarked on an unauthorised or extraneous or irrelevant exercise of discretion. It is also a firmly established practice that an appellate court will not alter a sentence merely because it might have passed a different sentence (see *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256; *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83).

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[57] In the instant appeal, while we accept that the subject matter of the first charge involved a huge amount of over RM1.5m, the amount is not the sole determining factor for sentencing. It is a principle of sentencing that the

- A mitigating factors must not be disregarded by the trial court (*Mohd Khir bin Toyo v Public Prosecutor* [2015] 5 MLJ 429; [2015] 8 CLJ 769) and that both the interests of the appellants and the public must be considered (see *Loo Choon Fatt*). We however find that the learned sessions judge did not at all consider the mitigating factors before passing the sentence. This is apparent from the grounds of judgment where nothing was mentioned about the mitigation of the appellants.
- B

- [58] The reasons why the appellants deserved the maximum sentence for the second charge is also conspicuously absent in the grounds of judgment of the learned sessions judge. In our judgment, the maximum sentence should be reserved and is only warranted in a 'worst case imaginable' scenario (see *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR 537; [1995] SGHC 27; *Che Hasan bin Senawi v Public Prosecutor* [2009] 1 MLJ 55). There is nothing on record to show why or how this case could be categorised as the 'worst case imaginable' scenario.
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- D

- [59] On the basis that the learned sessions judge had completely disregarded the mitigation of the appellants and had not given any justification for the imposition of the maximum sentence, we opined that this is a suitable case for appellate intervention on sentence. We therefore unanimously allow the appeal on sentence. We set aside the sentence imposed by the sessions judge and we substitute with a sentence of five years and three years for the first charge and the second charge respectively on each appellant, the sentences to run concurrently.
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Appeal against convictions dismissed but appeal against sentence allowed.

Reported by Kohila Nesan

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